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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CARMELO PLACERES, Defendant and Appellant.	D074480 (Super. Ct. No. SCE379869)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from convictions for an unprovoked attack by Carmelo Placeres on an older, smaller victim. A jury convicted Placeres of simple battery, as a lesser

included offense of battery with serious bodily injury (Pen. Code[1] § 242; count 1) and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 2). The jury did not find the allegation of infliction of great bodily injury to be true. Placeres admitted a strike prior conviction.

The court denied the motion to dismiss the strike prior and imposed a six-year prison term.

Placeres appeals, contending the trial court erred in failing, without request, to instruct on simple assault as a lesser included offense of count 2. We find there was not substantial evidence to justify an instruction on simple assault.

STATEMENT OF FACTS

The facts of the offenses are not seriously in dispute. As a convenience, we will adopt the Respondent's statement of facts to provide background for the discussion which follows.

On the afternoon of March 4, 2018, victim James M. and his wife visited the Viejas Casino in Alpine. While he was playing the slot machines, an unidentified stranger playing on the machine next to him asked James to hold the machine for her, saying she would return in a minute. While she was gone, Placeres approached and began gambling on the machine. James informed Placeres that he had been asked to watch the machine and explained that the patron who had been using it would return at

1 All further statutory references are to the Penal Code unless otherwise specified.

any moment. As they were speaking, the stranger returned, and James went back to playing on his own machine. Placeres walked away, mumbling something.

Shortly following this exchange, James left his slot machine to use the restroom. Louis H.—a bystander who did not know the victim—saw Placeres enter the restroom immediately thereafter and was taken aback by Placeres's remarkable size.[2] While James was using the urinal, Placeres approached him, stating, "I heard what you said to that lady." As James turned to look back, Placeres punched him very hard several[3] times in the face, hitting his left eyebrow and upper left cheek. The attack also caused James' head to hit the wall.

As he was being beaten, James told Placeres "I don't even know you" and Louis intervened, yelling "that's enough!" in order to stop the attack. Placeres quickly fled the scene and Louis went to aid James, who was bleeding from a gash above his eye. The two men exited the restroom and separately informed casino employees of the crime that had occurred.

Viejas security personnel and deputy sheriffs apprehended Placeres, who was visibly intoxicated and combative with security staff. James was brought to where Placeres was being detained and identified him as the man who had attacked him. At trial, both the victim and the eyewitness confirmed with certainty that Placeres was the assailant from the restroom.

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2 Placeres stands 6'5" and weighs 230 pounds.

3 James recalled being hit twice while Louis testified that he witnessed Placeres throw between three and six rapid punches at the older victim.

James' injuries required treatment in a hospital emergency room. He received six stitches for the laceration inflicted by one of Placeres's blows. In addition, he underwent a brain scan and neck examination to ensure the attack had not caused a concussion or broken bones. Victim had lasting effects from the assault, including diminished muscle control in opening and closing his eye and persistent pain in the back of his head.

DISCUSSION

Placeres contends the trial court erred in failing to give a jury instruction on the lesser offense of simple assault. In large part, his argument is based on the fact the court instructed on simple battery and the jury found the lesser offense in count 1 to be true. Placeres reasons it is likely the jury would have taken similar action had they been given the option of simple assault for count 2. We address this contention first.

The defense presented was that Placeres was wrongly identified as the perpetrator. Defense counsel told the jury there was no dispute as to what happened in the bathroom where the victim was attacked. Counsel said "there's no question about what happened there. The question is: Who did it?"

The second prong of the defense was that the one inch cut to the victim's forehead, albeit requiring six stitches was not enough to prove serious or great bodily injury. The latter defense was successful in that the jury did not find the allegations of great or serious bodily injury to be true. Thus, absent such injury, simple battery was the verdict chosen. On the other hand, count 2, assault with force likely to cause great bodily injury did not require proof of any actual injury. Rather, it depended on the nature and circumstances of the force actually used. We will therefore turn to the question of

whether there was substantial evidence to support an instruction on simple assault, which question we will answer in the negative.

A. Legal Principles

For the most part, the parties do not dispute the applicable law in this case. They correctly agree that simple assault is a lesser included offense (LIO) of the offense of assault by means likely to cause great bodily injury. Further, they agree that the trial court had a sua sponte duty to instruct in the applicable principles of law, including LIOs where there is substantial evidence to support such instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 148.) Such duty exists even though the defense may have a different theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469.)

We independently review the trial court's decision (or omission) to deny an LIO instruction. We review the evidence regarding applicability of such instruction in the light most favorable to the defendant. (*People v. Mullendore* (2014) 230 Cal.App.4th 848, 856.) The question is not whether there is substantial evidence to support the greater offense, but whether under deferential review there is substantial evidence in the record to support a finding of the lesser offense.

B. Analysis

Even a review of the record favorable to the defendant in this case does not demonstrate substantial evidence to support the LIO instruction of simple assault. At the risk of repeating ourselves, the defense does not challenge the nature of the unprovoked attack by the defendant on the victim. Placeres, a much younger and bigger person than the victim, blindsided the victim with a series of vicious punches to his head and face.

The exact number of blows is not clear, but the witness testimony indicates as likely four punches and perhaps as many as six. The blows were described as hard and fast. The victim's head was knocked against the wall, leading to six stitches to close a wound as well as lingering symptoms the victim was still suffering at the time of trial.

Of course, actual infliction of a wound is not necessary to prove the force element of the charged, aggravated assault. However, the nature of the injuries inflicted is relevant to an analysis of the force used. (*People v. Chavez* (1968) 268 Cal.App.2d 381, 384.) Even where the actual injuries do not rise to the level of great bodily injury, they may still reveal the excessive nature of the force used. (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 733.)

Placeres relies in part on the jury's finding on the LIO battery, indicating a reasonable doubt as to whether the cut involved qualified as great bodily injury. However, as we have explained above, no injury is required to prove assault with force likely to cause great bodily injury. As we have noted, the defense did not dispute the evidence of the nature and circumstances of the assault. The only defense offered as to that count was identity. As counsel explained the question at trial was "Who did it?," not what the degree of the offense was. There was never a contention that the greater offense had not been proved as opposed to the challenge to the identity of the perpetrator.

Applying the proper standard of review, we are satisfied there was not substantial evidence to support giving an instruction on the LIO of simple assault.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.